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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NATHANIEL ALLAN JOHNSON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from No. 09-19-00097-CR
In the Court of Appeals
Ninth District of Texas at Beaumont

APPELLANT NATHANIEL ALLAN JOHNSON'S BRIEF ON THE MERITS

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

I. Honorable Phil Grant, Judge Presiding
9th Judicial District Court of Montgomery County, Texas

II. Nathaniel Allan Johnson, Appellant

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III. The State of Texas, Appellee

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NO. PD–1211–20

IN THE
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NATHANIEL ALLAN JOHNSON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

Appellant Nathaniel Allan Johnson, proceeding through counsel, files this his Brief on the Merits and respectfully shows the following.

STATEMENT OF THE CASE

Appellant was convicted on March 21, 2019, of felony assault against a family member, enhanced by two prior convictions. 4 R.R. 5–56; 81; 84–85. Punishment was assessed at life incarceration. 4 R.R. 81; 84–85. Appellant gave

timely notice of appeal on March 21, 2019. 4 R.R. 85. The Ninth Circuit Court of Appeals affirmed the conviction. *Johnson v. State*, 2020 WL 6929375 (Tex. App. – Beaumont, pet. granted).

Appellant (as Petitioner) filed a timely Petition for Discretionary Review with this Court, raising two issues for review. The Court granted discretionary review on March 31, 2021, as to Appellant's first issue for review, and granted Appellant an extension of time to file his Brief on the Merits. Appellant's Brief on the Merits is timely filed.

ISSUES PRESENTED

> The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Appellant had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A).
>
> A. Appellant was entitled to a directed verdict; and
>
> B. Appellant's objections to the section 22.01(b)(2)(A) jury charge were erroneously denied.
>
> C. Appellant is entitled to an order of acquittal.

STATEMENT OF FACTS

A Montgomery County grand jury indicted Appellant, in relevant part, as follows:

> . . . on or about May 27, 2018, and before the presentment of this indictment, [Appellant] did intentionally, knowingly or recklessly cause bodily injury to [Rhonda], a member of the defendant's family

> or a member of [Appellant's] household or a person with whom the [Appellant] has or has had a dating relationship, as described by Section 71.003 or 71.005 or 71.0021(b), Family Code, by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of [Rhonda], by applying pressure to [Rhonda]'s throat or neck or blocking [Rhonda]'s nose or mouth[.]

The facts underlying the primary offense itself ("impeding the normal breathing or circulation of the blood") are not dispositive of the issues in this appeal. Rather, the issues on appeal involve the following paragraph of the indictment, which alleged a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A), an element of the charged offense:

> And it is further presented in and to said Court, that before the commission of the offense alleged above, [Appellant] had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005 or 71.0021(b) of the Family Code[.]

Johnson, 2020 WL 6929375, at *1.

The remaining relevant facts will be discussed under the Argument section of Appellant's Brief on the Merits for the Court's convenience and in order to avoid duplication of briefing sections.

SUMMARY OF THE ARGUMENT

The State presented absolutely no evidence that Appellant had a prior conviction for, or that a 2009 Arkansas "battery in third-degree domestic"

conviction was statutorily equivalent to, an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with him was described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code. Consequently, the trial court erred in overruling Appellant's motion for directed verdict and his objections to the jury charge.

ARGUMENT

The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Appellant had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A).

The plain language of section 22.01(b)(2)(A) requires that the prior conviction for jurisdictional purposes must be a Texas conviction meeting the statute's requirements, and the State only introduced evidence of an Arkansas offense. Regardless, the State did not establish that the Arkansas offense met the requirements for a qualifying conviction under the statute.

The Beaumont Court of Appeals set forth an essentially appropriate standard of review. In reviewing the legal sufficiency of the evidence, a court must review all the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*,

214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The fact-finder is the exclusive judge on the credibility of witnesses and the weight to be given their testimony. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). Deference is given to the fact-finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. If the record contains conflicting inferences, it is presumed that the fact-finder resolved such facts in favor of the verdict. *Brooks v. State*, 323 S.W.3d 893, 899 n.13 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

In the instant case, Appellant was charged under Texas Penal Code § 22.01(b)(2)(A) with third-degree felony assault involving family violence with a prior conviction for family violence. Proof of a qualifying prior conviction for family violence was an element of the charged offense, and not an enhancement paragraph. *See Calton v. State*, 176 S.W.3d 231, 233–34 (Tex. Crim. App. 2005) (holding proof of prior conviction for evading arrest is an element of third-degree felony evading arrest and must be proven at guilt phase of trial). Under Texas Penal Code § 22.01(f)(2), "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an

offense listed in those subsections is a conviction of the offense listed." TEX. PENAL CODE § 22.01(f)(2).

Thus, the State had the burden to prove beyond a reasonable doubt that Appellant had either

> (1) a prior Texas conviction for an offense under Texas Penal Code Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 against a person whose relationship to or association with him was described by Texas Family Code Section 71.003, 71.005, or 71.0021 (b),
>
> ***or***
>
> (2) a prior conviction from another state for an offense containing elements substantially similar to the elements of those Texas Penal Code sections or subsections.

The State did neither of these. It did not allege that Appellant had a prior Texas conviction meeting the requirements of section 22.01(b)(2)(A). Instead, the State alleged that Appellant had a prior conviction in Arkansas in 2009 for "battery in the third-degree domestic" which it claimed qualified under the provisions of section 22.01(f)(2).

Thus, the State was required to prove beyond a reasonable doubt with legally sufficient evidence during the guilt-innocence phase of trial that Appellant committed the underlying Texas assault offense by impeding complainant Rhonda's normal breathing, ***and*** that he was previously convicted in Arkansas in 2009 for an offense containing elements substantially similar to the elements of

those subsections listed for purposes of section 22.01(b)(2)(A). *See Flowers v. State*, 220 S.W.3d 919, 921–22 (Tex. Crim. App. 2007). This, the State completely failed to do.

The State introduced into evidence State's Exhibit #11, which it represented to the trial court as a "self-authenticating, certified judgment" from the state of Arkansas against Appellant for third-degree domestic battery in 2009. 2 R.R. 280–01. The trial court itself was hesitant, and noted on the record that the exhibit "looks like a docket sheet, not a judgment." *Id.*

In attempting to prove up the Arkansas event as a "qualifying conviction" for purposes of section 22.01(b)(2)(A), the State presented Randal Gilbert from the Union County Sheriff's Department in Arkansas. Unfortunately for the State, Gilbert testified under cross-examination that Exhibit #11 was a case docket sheet, and *not* a judgment. *Id.* at 283, 285.

Moreover, Gilbert had no knowledge or familiarity with the relevant Texas code sections for purposes of meeting the requirements of section 22.01(f)(2):

> Q. Okay. And are you familiar with the Texas law penal code regarding domestic violence?
>
> A. No, I am not.
>
> Q. Are you familiar with the family code Section 21.11, 20.04, 20.03, and Chapter 22 and Chapter 19 of the Texas Penal Code is?

A. No, I'm not.

Q. Do you have any idea what the requirements of that are?

A. No, I have no clue.

Id. at 286.

Neither Gilbert nor any other witness provided legally sufficient evidence to prove that Appellant was previously convicted in Texas of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Penal Code, against a person whose relationship to or association with Appellant was described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code, as required by section 22.01(b)(2)(A). Nor did the State utilize Texas Penal Code § 22.01(f)(2) to prove that the Arkansas criminal event substantially met the requirements for a qualifying Texas conviction under section 22.01(b)(2)(A).

In short, there was absolutely no evidence that the 2009 Arkansas "battery in third-degree domestic" event was the equivalent of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with Appellant was described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.[1]

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[1]The trial court acknowledged on the record that it may have erred in allowing in evidence of the Arkansas event:

Now that I know the level of proof that they had to bring – or the quality of proof

In denying these arguments, the Beaumont Court of Appeals held as follows:

> Here, the State introduced the certified docket sheet noting that Johnson pleaded guilty to Battery 3rd Degree Domestic, and two witnesses testified to personal knowledge of Johnson's arrest and conviction for the charge. For purposes of the relevant sections of the statute, "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." TEX. PENAL CODE ANN. § 22.01(f)(2). Viewing all the evidence in the light most favorable to the verdict and after reviewing all the evidence and considering all reasonable inferences therefrom, we conclude that a rational fact-finder could have found the elements of the offense beyond a reasonable doubt.

Johnson, 2020 WL 6929375, at *7.

Conspicuously absent from the Beaumont court's opinion is any analysis or description of any evidence it relied on in finding there was "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." The Beaumont court did not even discuss whether the 2009 Arkansas "Battery 3rd Degree Domestic" event contained elements substantially similar to the elements of the Texas offenses listed in the relevant sections or

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> that they had to bring in that Arkansas case, I may have disallowed them going into that. But unfortunately at this point I've let them go into it. I've let her arraign this jury on that jurisdictional paragraph, so now that bell has been rung that he's got a prior conviction.

Id. at 7. Ultimately, however, the trial court was of the opinion that the State had "provided *a scintilla* of evidence" and allowed the trial to go forward. *Id.* at 117 (emphasis added).

subsections. With no analysis or identification whatsoever of any evidence or relevant legal provisions, the Beaumont court inexplicably found that "a rational fact-finder could have found the prior conviction beyond a reasonable doubt[.]" This is not only erroneous but incredible, given that no evidence appears in the record upon which a rational fact-finder could have based such a finding.

The evidence is insufficient – indeed, there is *no* evidence – to support an express or implied finding of a qualifying prior conviction for purposes of section 22.01(b)(2)(A), or that the 2009 Arkansas "battery in third-degree domestic" was a qualifying non-Texas conviction under section 22.01(f)(2). Accordingly, the Beaumont Court of Appeals erred in affirming the conviction and the conviction should be reversed.

A. Appellant was entitled to a directed verdict

"A motion for instructed verdict is essentially a trial level challenge to the sufficiency of the evidence." *Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016). Therefore, "[w]e treat a point of error complaining about a trial court's failure to grant a motion for directed verdict as a challenge to the legal sufficiency of the evidence[,]" and the *Jackson v. Virginia* standard of review applies. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) (citing *Jackson*, 443 U.S. at 319).

As shown above in the first portion of Appellant's Argument section, the State failed to present legally sufficient evidence that Appellant had a prior conviction for, or that the purported 2009 Arkansas conviction was statutorily equivalent to, an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with him was described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

Defense counsel re-urged these objections in a motion for directed verdict at the close of the State's evidence. 3 R.R. 165–66. The motion was denied. *Id.* at 166. On appeal, the Beaumont Court of Appeals held that,

> Because we have concluded that the evidence presented at trial was sufficient under *Jackson v. Virginia* to support the jury's verdict, we overrule Appellant's issue challenging the trial court's denial of Appellant's motion for directed verdict. *See Smith*, 499 S.W.3d at 6; *Williams*, 937 S.W.2d at 482.

Johnson, 2020 WL 6929375 at *8.

A directed verdict at the close of the State's case challenges the sufficiency of the State's evidence to prove its case. As shown above, the State failed to meet its burden of proving Appellant had a prior Texas conviction meeting the specifications of section 22.01(b)(2)(A) or a non-Texas conviction that qualified

under section 22.01(f)(2). Consequently, Appellant's motion for a directed verdict should have been granted.

B. Appellant's objections to the § 22.01(b)(2)(A) jury charge were erroneously denied.

Moreover, a trial court has a duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14; *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015). Analysis of an alleged jury charge requires consideration of dual inquiries: (1) whether error existed in the charge; and (2) if so, whether sufficient harm resulted from the error to compel reversal. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

In Appellant's case, the State was not entitled to a jury charge regarding an alleged offense under section 22.01(b)(2)(A) because it failed to prove that Appellant had a prior conviction meeting the specifications of section 22.01(b)(2)(A) or that qualified under section 22.01(f)(2). Consequently, the State did not present evidence warranting a jury charge for felony assault family violence, and Appellant's objection to the jury charge should have been granted.

The Beaumont Court of Appeals did not address this issue, because it erroneously believed the State had provided legally sufficient evidence of Appellant's prior conviction:

> Also, because we have determined that a rational fact-finder could have found the prior conviction beyond a reasonable doubt, the trial court did not err in overruling Johnson's objection to the inclusion of the portions of the jury charge referencing Johnson's prior conviction.

Johnson, 2020 WL 6929375 at *8. The State did *not* present legally sufficient evidence of the prior conviction, thus the misdemeanor charge was improperly raised to a felony charge.

For these reasons, Appellant's motion for a directed verdict should have been granted. The trial court erred in denying a directed verdict, the Beaumont Court of Appeals erred in upholding that erroneous ruling, and Appellant's conviction should be reversed and set aside.

C. Appellant is entitled to an order of acquittal.

The United States Supreme Court has long recognized that the Constitution prohibits the State from retrying a defendant if the evidence was held legally insufficient under *Jackson v. Virginia* on review. *See Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978).

The State has but one opportunity to amass and present evidence legally sufficient to convict a defendant. In this case, it failed to do so. Because the evidence is legally insufficient under the *Jackson v. Virginia* standard, Appellant's conviction should be reversed with an order of acquittal. In the alternative, the

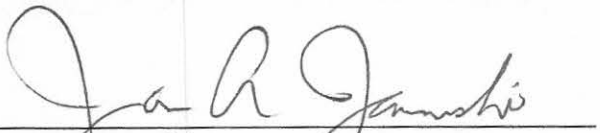
conviction should be reversed with an order remanding the case to the trial court for entry of an acquittal.

PRAYER FOR RELIEF

Appellant Nathaniel Allan Johnson prays that the Court reverse the conviction and enter a judgment of acquittal order such relief as the Court may deem appropriate.

Respectfully submitted,

LAW OFFICE OF JON A. JAWORSKI



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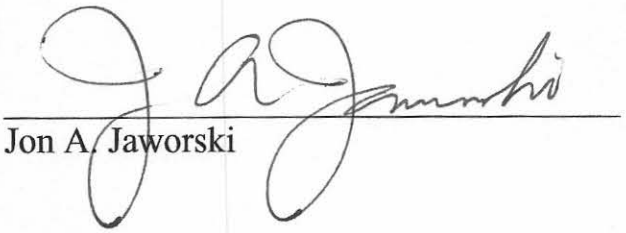
CERTIFICATE OF COMPLIANCE

Pursuant to TRAP Rule 9.4, I hereby certify that this Appellant's Brief on the Merits was prepared using WordPerfect 2020 with fourteen-point font, and twelve-point font for any footnotes, in Times New Roman typeface font. Omitting the portions not included for the word limit, this brief contains 2,356 words as calculated by the WordPerfect 2020 program.



Jon A. Jaworski

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant Nathaniel Allan Johnson's Brief on the Merits has been served upon the following counsel of record in accordance with the Texas Rules of Appellate Procedure on this the 17th day of May, 2021, via certified mail, return receipt requested:

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